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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 548

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of HARRY NELSON HARSHBERGER, Deceased,
Petitioner,

v.

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SPENTON, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on August 29, 1960.

OPINIONS BELOW

The order and judgment of the trial court is unreported and is printed in Appendix A hereto, p. 3a. The opinion of the United States Court of Appeals for the Second Circuit is as yet unreported and is printed in Appendix B hereto, p. 4a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 29, 1960. The jurisdiction of this Court is invoked, under 28 U.S.C., Sec. 1254(1), authorizing this Court to review the judgment of the Court of Appeals by writ of certiorari.

QUESTIONS PRESENTED

1. Whether the Court of Appeals, reversing a judgment entered for the plaintiff-petitioner by the trial court after denying the defendants-respondents' motion to set aside the verdict and motion to dismiss the complaint for failure of proof upon which decision had previously been reserved, was required under Rule 50(b) of the Federal Rules of Civil Procedure to remand the case to the District Court for its determination either to order a new trial or to enter judgment for the defendants, under the doctrine of *Johnson v. New York, N. H. & H. R. Co.* (1952), 344 U.S. 48, 73 S. Ct. 125.

2. Whether the evidence supported a verdict and judgment for the plaintiff-petitioner in a wrongful death action, under the New York rule that in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 50(b):

"*Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have sub-

mitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT

The petitioner, as administratrix of the estate of the decedent, brought a wrongful death action against the respondents as the owner and operator respectively of a truck which negligently collided with the decedent's vehicle. The jurisdiction of the United States District Court for the Northern District of New York was invoked because of diversity of citizenship, the petitioner being a resident of the State of Pennsylvania, one respondent being a Delaware corporation doing business within the Northern District of New York, and the other respondent being its employee and a citizen of the State of New York. After evidence had been offered by the petitioner in a trial before a jury, the petitioner rested and the respondents moved that the complaint be dismissed "for failure to make

out a case" [Appellants' Appendix, p. 74]. The court reserved decision on the motion. The respondents then rested without offering any evidence on the ground that the petitioner "has failed to prove a case [Appellants' Appendix, p. 75]. Thereupon the petitioner reopened the case and offered more evidence. After petitioner rested the second time, respondents moved to dismiss the complaint on the ground that the petitioner had failed to make a case and had shown no negligence against the respondents. The court reserved decision on the motion [Appellants' Appendix, p. 86].

The respondents then offered additional evidence and, after a brief rebuttal, all parties rested. Respondents moved that the complaint be dismissed for failure of proof, and the court reserved decision with the statement that it would submit the case to the jury [Appellants' Appendix, p. 185].

After deliberation, the jury brought in a verdict for the petitioner for $50,000. On the same date, and immediately after the announcement of the verdict, counsel for respondents orally made a motion to set aside the verdict, and the court stated that it construed the motion as broad enough to raise any questions that may be raised on a motion to set aside a verdict. Respondents' counsel then stated that: "And then I would also renew my original motion made at the conclusion of the plaintiff's case, and when the defendant rested for the first time that the complaint be dismissed for failure of proof, and if I remember correctly you reserved decision on that" [Appellants' Appendix, p. 203]. The court denied all motions including those on which it had reserved decision [Appellants' Appendix, p. 204].

The respondents perfected an appeal to the United States Court of Appeals for the Second Circuit, maintaining that the evidence was legally insufficient for the submission of petitioner's case to the jury. The respondents further contended that: "In the Harshberger case, the judgment should be reversed, with costs, the verdict in her favor as well as the denials of appellants' motions for final judgment, should be set aside and the case should be remanded to the District Court for further proceedings on appellants' said motions to determine whether they should be granted or a new trial should be had" [Appellants' Brief, p. 37].

The Court of Appeals determined that the petitioner's evidence was insufficient as a matter of law to justify submission of the case to the jury. However, after noting respondents' request to reverse the judgment, set aside the verdict, and remand the case to the District Court to act upon the respondents' motion and pass upon the new trial question, the Court of Appeals held that the motions were acted upon after the verdict had been returned, and reversed the judgment in favor of the petitioner without remanding for determination of the new trial issues [Appendix B, post].

The District Court thereafter entered an order which, without reciting notice or a hearing concerning the question of a new trial to the petitioner, provided that in accordance with the judgment, opinion, and mandate of the Court of Appeals which had been filed therein, the judgment previously entered in favor of the petitioner was reversed, the motions which the respondents had made that the verdict of the jury be set aside were granted, and it was adjudged that the

petitioner had no cause of action against the respondents [Appendix A, post].

The evidence showed that the petitioner's decedent was killed in a head-on collision between his automobile and the respondents' tractor-trailer proceeding in opposite directions at about 4:20 A.M., on a very rainy night. Decedent was travelling in an easterly direction on a 20-21 foot macadam highway which curved to his right. The respondents' tractor-trailer was 60 feet long and 8 feet wide carrying a load between 19,000 and 20,000 pounds. [Appellants' Appendix, pp. 7-8, 10, 17, 20, 52-54, 57, 60, 68, 84, 92, 102, and 150.]

The curve was 6 degrees and 550-560 feet long [Appellants' Appendix, pp. 29 and 39]. The two vehicles came to rest after the collision near a telephone pole which was 10 feet south of the highway and within a few feet of the start of the curve to the south. The automobile was facing west partly on the pavement and partly on the south shoulder. [Appellants' Appendix, pp. 48-52, 63, 64, 117-119, 122, 126, 128-129, 137, 144-145, and 150.] The tractor-trailer was almost directly opposite the same pole on the north side of the highway, being jackknifed so that the trailer headed west and the tractor faced south [Appellants' Appendix, pp. 118 and 122]. The right wheels of the trailer were on the northerly shoulder, and both rear wheels of the tractor were on the north edge of the pavement [Appellant's Appendix, pp. 117, 122, 136-139, and 148].

Petitioner's decedent was thrown out of his car, and his body came to rest on the south shoulder of the highway between his car and the telephone pole [Appellants' Appendix, p. 49]. Respondent truckdriver was thrown out of his cab on the south half of the highway

[Appellants' Appendix, pp. 48-49, 82, 91-92, 118, and 119].

Decedent had been following his brother's truck which was four to five car lengths (80-100 feet) ahead of decedent [Appellants' Appendix, pp. 43 and 60]. He and his brother had travelled in this position approximately 242 miles, and the brother kept the decedent under constant observation in his rear-view mirror [Appellants' Appendix, pp. 40-43 and 184]. When decedent's brother was about 1½ car lengths from the tractor-trailer, he looked in the mirror to see where the decedent was [Appellants' Appendix, p. 45] and observed him on his own side of the highway about four or five car lengths (80 to 100 feet) behind him [Appellants' Appendix, pp. 45 and 46].

The brother testified that the speed of respondents' truck was 40 to 50 miles an an hour, and the legal speed limit at that point was 50 miles per hour [Appellants' Appendix, p. 47]. The respondent truckdriver admitted that he was travelling approximately 40 miles per hour [Appellants' Appendix, pp. 111 and 114]. When he saw the decedent's headlights approaching him at an estimated distance of 75 to 100 feet, he thought the decedent was partly on his side of the highway, and he then flashed his lights up and down several times, pumped his air brakes, swerved to his right, and may have sounded his horn. [Appellants' Appendix, pp. 91, 93, 94, 112, and 113.]

Although two witnesses from the sheriff's office testified that there was a scrape mark which described an arc from the west-bound lane towards the decedent's automobile, there was no testimony as to how such mark was made or that it existed immediately after the

accident [Appellants' Appendix, pp. 130 and 117], nor that it had any connection with the decedent's automobile [Appellants' Appendix, p. 129]. Photographs of the scene taken immediately after the collision did not disclose any such marks [Appellants' Appendix, p. 129].

The distance from the front bumper to the rear wheels of the tractor was 14 feet 5½ inches [Appellants' Appendix, p. 152]. The rear wheels of the tractor were close to the edge of the pavement on the north side of the highway [Appellants' Appendix, p. 138], and the tractor-trailer was jackknifed [Appellants' Appendix, p. 137], with the tractor facing south [Appellants' Appendix, pp. 118 and 122].

The curve was banked on the north side [Appellants' Appendix, pp. 78-81]. The truckdriver testified that he met the decedent's brother as "I was just starting to fall into the west curve" [Appellants' Appendix, p. 103].

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals, After Deciding There Was Insufficient Evidence to Support a Verdict, Failed to Follow the Requirements of Rule 50(b) and Remand to the District Court for It to Determine Whether to Order a New Trial or to Enter Judgment Contrary to the Verdict

In the instant case, after the jury brought in a verdict for the plaintiff-petitioner, two oral motions were made by the defendants-respondents on the same day and prior to judgment: The first motion was to set aside the verdict [Appellants' Appendix, p. 203]. The second motion [Appellants' Appendix, p. 203] was phrased as follows:

> "And then I would also renew my original motion made at the conclusion of the plaintiff's case,

> and when the defendant rested for the first time, that the complaint be dismissed for failure of proof, and if I remember correctly you reserved decision on that. I now renew that motion."

The petitioner contends that neither motion constituted a motion for judgment notwithstanding verdict under Rule 50(b) of the Federal Rules of Civil Procedure, and hence the Court of Appeals could only grant a new trial but could not require a judgment to be entered contrary to the verdict.

This Court settled the question of the power of the Court of Appeals to direct entry of judgment notwithstanding the verdict where a timely motion for such a judgment had not been made in the district court in *Cone v. West Virginia Pulp & Paper Co.* (1947), 330 U.S. 212, 67 S. Ct. 752. In that case, at the close of all the evidence the respondent moved for a directed verdict but did not move for judgment notwithstanding the verdict as it might have done under Rule 50(b). It was held that under Rule 50(b) the trial court is not required to enter judgment notwithstanding the verdict upon reopening the judgment, but instead may grant a new trial. At page 754 the Court said:

> "Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court 'may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.' This 'either-or' language means what it seems to mean, namely, that there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of

> the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See Berry v. United States, supra, 312 U.S. 452, 453, 61 S. Ct. 638, 85 L. Ed. 945. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. . . ."

Accordingly, the Court of Appeals did not have the power to direct the entry of a judgment.

This rule was followed even in a situation where the verdict appealed from was a directed verdict granted by the trial court. In *Globe Liquor Co.* v. *San Roman* (1948), 332 U.S. 571, 68 S. Ct. 246, after all the evidence had been introduced, each party requested a directed verdict and the petitioner's motion was granted. Respondents then moved for a new trial but did not make a motion for judgment notwithstanding verdict under Rule 50(b). It was held that the requirement of an appropriate motion under Rule 50(b) applied, and hence the Court of Appeals did not have the power to remand the case to the district court with directions to enter judgment for the respondent. It was necessary for the district court to first pass upon the ques-

tion whether its error should result in a new trial or in a judgment finally ending the controversy.

The first motion in the instant case, to set aside the verdict, is not the post-verdict motion contemplated by Rule 50(b). This is demonstrated by the decision in *Johnson* v. *New York, N. H. & H. R. Co.* (1952), 344 U.S. 48, 73 S. Ct. 125. In that case petitioner-plaintiff sued the respondent-defendant railroad under the Jones Act for the wrongful death of her husband. When the evidence was all in, the respondent moved to dismiss the complaint and also asked for a directed verdict, upon which the trial court reserved decision. The jury brought in a verdict for the petitioner, and within ten days after the reception of the verdict the respondent moved to set aside the verdict on the ground that it was excessive, contrary to the law, to the evidence, and to the weight of the evidence. More than two months later this motion was denied, and in the same order the court also denied the pre-verdict motions for dismissal and for a directed verdict on which action had been reserved. This Court held that although the respondent made several motions, it did not make a motion for judgment notwithstanding the verdict as required by Rule 50(b). In answer to the respondent's contention that its motion to set aside the verdict was intended to be a motion for judgment in its favor or for a new trial and that obviously the respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside, this Court stated that the respondent's motions "cannot be measured by its unexpressed intentions or wants" (at p. 127). Accordingly, respondent's motion was treated as one to set aside the verdict, and it was held to be entitled only to a new trial and not to a

judgment in its favor after the Court of Appeals determined that a jury verdict could not be sustained. It was also noted that the fact that the trial court expressly reserved decision on the motion for a directed verdict did not eliminate the necessity of a motion for judgment n.o.v. under Rule 50(b).

The second post-verdict motion made by the respondents in the instant case was a renewal of the original motion for directed verdict "made at the conclusion of the plaintiff's case, and when the defendant rested for the first time." Inasmuch as the defendant, after resting for the first time, proceeded to put on its case, it is apparent that the motion did not even renew a motion for directed verdict made at the close of all the evidence, as required by Rule 50(b). In any event, such motion did not constitute a motion for judgment notwithstanding verdict.

A similar problem was presented to the court in *Shaw* v. *Hines Lumber Co.* (C.A. 7, 1957), 249 F. 2d 434. In that case a motion for directed verdict at the close of all the evidence was reserved by the court and the case submitted to the jury, which returned a verdict for the plaintiff. On the same day the defendant asked the court to set for hearing its motion for directed verdict, which was done and the matter argued prior to the entry of judgment. Upon conclusion of the argument, the trial judge allowed the motion, set aside the verdict, and entered judgment for the defendant. The reviewing court construed the procedural situation to be that a specific post-verdict motion for judgment notwithstanding verdict had not been made. It reviewed the United States Supreme Court decisions and pointed out that the reason for the necessity of a judg-

ment notwithstanding verdict was to give the trial court an opportunity to exercise its discretion under Rule 50(b) to grant a new trial rather than a judgment notwithstanding the verdict. In situations where a trial court has entered judgment for the plaintiff and specifically denied the defendant's motion for a directed verdict, the plaintiff is not in a position to urge that the court should grant a new trial because the verdict and judgment are in his favor. Such lack of opportunity for the trial judge to exercise initially his informed judicial discretion was deemed seriously prejudicial to plaintiffs under such circumstances. However, in this case the plaintiff did have an opportunity to urge a new trial inasmuch as the trial court at a hearing allowed the defendant's motion. Accordingly, it was held that the district court was not precluded from entering judgment for the defendant on the basis of its allowed motion for directed verdict, even though there was no specific motion for judgment notwithstanding the verdict.

Fairly construed, the respondent's motion in the instant case is the same as the defendant's motion in *Shaw* v. *Hines Lumber Co.*, supra; and here, too, there was no express motion for judgment n.o.v. as contemplated by Rule 50(b).

The importance of allowing the trial court to exercise its discretion relative to granting a new trial or a final judgment is shown by the following language from *Johnson* v. *New York, N. H. & H. R. Co.*, supra:

> "... The Fifth Circuit emphatically pointed out that mere reversal and remand for proceedings consistent with the opinion did not authorize a trial court to enter judgment notwithstanding the verdict; entry of such a judgment was only to be

> granted as of discretion and after a hearing. Fleniken v. Great American Indemnity Co., 142 F. 2d 938; see also In re Mutual Life Ins. Co. of New York, 188 F. 2d 424, 425-426."

See also *Montgomery Ward & Co.* v. *Duncan* (1940), 311 U.S. 243, 61 S. Ct. 189; *Fountain* v. *Filson* (1949), 336 U.S. 681, 69 S. Ct. 754; *McKee* v. *Sheraton-Russell, Inc.* (C.A. 2, 1959), 268 F. 2d 669; *Binder* v. *Commercial Travelers Mut. Acc. Ass'n* (C.A. 2, 1948), 165 F. 2d 896.

In this case even the respondents conceded that the Court of Appeals should remand the case to the district court for further proceedings to determine whether a new trial should be granted, stating at p. 38 of the Appellants' Brief as follows:

> "Since those motions were denied not in the exercise of judgment whether there should be a new trial rather than a final disposition in appellants' favor, but because both alternatives were barred by the undisturbed verdicts, the trial court was not called upon to, and did not, exercise the discretion which it would have exercised had it set aside the verdicts (*Shaw* v. *Edward Hines Lumber Co., supra*). Hence, if this court reverses the judgment and sets aside the verdicts, the case should be remanded to the District Court for it to determine what should follow the setting aside of the verdicts."

The Court of Appeals, however, refused to follow this request of the respondents, holding that the post-verdict motions had been acted upon by the trial court. This completely overlooked the fact that the trial court did not purport to exercise its discretion regarding a new trial because it was denying the respondents' mo-

tions for directed verdict or to set aside the verdict. At no point has such discretion been exercised, despite the repeated pronouncements by this court that such requirement is mandatory under Rule 50(b).

II. Under New York Law, Only Slight Evidence of Negligence Is Necessary in a Death Action

The applicable principles of law in New York cases such as this were set forth in *Paul* v. *Staten Island Edison Corp.* (1956), 2 A.D.2d 311, 155 N.Y.S. 2d 427, as follows:

> "In a death action such as this, in which, at the end of plaintiff's proof, the complaint has been dismissed as a matter of law, the facts must be read, and their sufficiency to establish a prima facie case, must be judged in the light of these four well established principles: (1) that the plaintiff is not held to as high a degree of proof as where an injured plaintiff can himself describe the occurrence; (2) that the evidence adduced at the trial is to be considered in the aspect most favorable to plaintiff, who is entitled to the benefit of every favorable inference which can be reasonably drawn from the evidence; (3) that the burden is on the defendant to establish the decedent's contributory negligence, and (4) that if any possible hypothesis based on the evidence forbids the imputation of fault to the deceased, as a matter of law, the question is for the jury. Anderson v. Bee Line, 1 N.Y. 2d 169, 172, 151 N.Y.S.2d 633, 634; Flynn v. Long Island R. R. Co., 289 N.Y. 283, 45 N.E.2d 445; Chamberlain v. Leigh Valley R. R. Co., 238 N.Y. 233, 235, 144 N.E. 512; Decedent Estate Law, #119."

As the Court of Appeals noted in this case [Appendix B, p. 14a] "'in a death case a plaintiff is not held to as high a degree of proof of the cause of action

as where an injured plaintiff can himself describe the occurrence.' *Noseworthy* v. *City of New York* (1948), 298 N.Y. 76, 80, 80 N.E.2d 744. In other words, but slight evidence of negligence is necessary. *Wank* v. *Ambrosino* (1954), 307 N.Y. 321, 121 N.E.2d 216."

Applying New York law as above described, there was sufficient evidence to go to the jury and sustain the verdict in the petitioner's favor.

1. The location of physical objects at the scene of the accident demonstrates that the respondents' truck was on the wrong side of the highway at the time of the collision. Petitioner's decedent was travelling east. After the collision, the decedent's automobile was located on the south shoulder and southredge of the paved portion of the highway. The decedent's body was located south of his automobile, on the south shoulder of the highway. The respondent truckdriver was thrown from his cab and landed in the middle of the south lane of the highway. The front end of the tractor projected 4 feet 5½ inches south of the center line of the highway. (The rear wheels of the tractor were on the north edge of the pavement; the tractor was facing south; the distance from the front bumper to the rear wheels of the tractor was 14 feet 5½ inches; and the north lane of the highway was 10 to 10½ feet wide.) From such location of the physical objects on the south portion of the highway the jury could have inferred that the petitioner's decedent was on his own proper side of the road. This conclusion is reinforced by the testimony of his brother that shortly before the collision he observed the decedent's vehicle on its own side of the highway in the south lane.

2. It could be inferred that the speed of the respondents' tractor-trailer and resultant diminution of

control caused such vehicle to cross the center lane and collide with the decedent. The tractor-trailer was 8 feet wide while the west-bound land was only 10 feet wide. It was 60 feet long carrying a load of almost 20,000 pounds, and was travelling 40-50 miles per hour on a curve in heavy rain at night on a slippery macadam highway. Such speed was especially negligent when the vehicle was being driven around a left-hand curve which was banked on the north, causing both vehicles to veer toward the south and causing the truck to cross the center line. Even if the decedent was travelling at the same rate of speed, this would not necessarily be negligence on his part. Many states recognize that high speed by trucks is more dangerous than the same speed by automobiles, and provide speed limits such as 50 miles per hour for automobiles and 40 miles per hour for trucks.

3. The respondent truckdriver admitted that shortly before the collision he flashed his lights up and down several times. This could have temporarily blinded the decedent just at the critical moment when the truck was approaching him from the opposite direction on the curve. Section 15(3) of the Vehicle and Traffic Law of the State of New York prohibits the operation of a vehicle so that a dazzling light interferes with the driver of an approaching vehicle. The truckdriver sought to justify such conduct by testifying that he saw the decedent's lights approaching him and he thought the latter vehicle was on his side of the highway. However, this could readily be explained by the fact that decedent was driving his automobile, a rectangular object, around a right-hand curve. Inasmuch as his automobile lights were directed ahead and did not curve, at any given point the beam of his lights

would intersect the opposite lane of the highway. The truckdriver's speed and lack of control of his huge vehicle, coupled with his confusion concerning the decedent's lights, apparently caused him negligently to start flashing his own dazzling lights into the eyes of the decedent. It is also probable that the decedent's vehicle was more than 75 to 100 feet away from the truckdriver when the latter made this observation, because he testified that during the interval before the vehicles collided he raised and lowered his lights several times, pumped his air-brakes by pushing his foot back and forth, turned the wheel to the right, and perhaps sounded his horn. This is a great deal of activity to occur in less than one second, and the jury could reasonably infer that his estimates of relative speeds and distances were not very accurate.

4. The action of the truckdriver in suddenly applying air-brakes to his large and heavy vehicle on a rain-swept macadam highway could readily have caused the tractor-trailer to skid and start to jackknife before the collision, thus striking the decedent in his own lane of the highway.

5. A photograph of the respondents' tractor-trailer, it was contended by petitioner's counsel in his final argument to the jury, showed the left front tire immediately following the accident to be somewhat bare and obviously flat. It is true that the Court of Appeals viewed the photograph and felt that it disclosed somewhat more of a tread than a lack of it. However, since the jury and not the court is the trier of the facts, the weight of such evidence was for the jury. Certainly it constituted some circumstantial evidence contradicting the truckdriver's testimony that he had ex-

amined the tires and equipment on the truck, and a worn front tire would be more likely to become flat than a sound tire, which could cause the truck to veer across the center of the highway, especially when its air-brakes were applied suddenly in a moment of panic.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Motions After the Recording of the Verdicts

(Tr. 372) Mr. Williams: I think the Court will anticipate my motion. I move first off, the verdict as received in the first action is contrary to the weight of the evidence.

The Court: You move to set aside the verdict?

Mr. Williams: And I move to set it aside.

The Court: All right. I will construe your motions as being broad enough to raise any questions that may be raised on a motion to set aside a verdict, and will include any question that may be raised by such a motion. All right, what about your second case?

Mr. Williams: On the second case I make the same motion, your Honor.

The Court: The same motion on the second case and same construction.

Mr. Williams: And then I would also renew my original motion made at the conclusion of the plaintiff's case, and when the defendant rested for the first time, that the complaint be (373) dismissed for failure of proof, and if I remember correctly you reserved decision on that. I now renew that motion.

The Court: Gentlemen, I know you are both from out of town and I don't mean to cut you off. I think the case was fairly tried. It is a typical death case and I know of no particular thing wrong. If there was a prima facie case of negligence made by the plaintiff I know of nothing in the way of serious error on the part of the Court or anybody else in connection with the case that would justify me in setting aside the verdict. I think the question of negligence is close. Nevertheless in a death case I understand the rules which we follow. The jury is allowed pretty broad latitude as to the drawing of inferences especially in the absence of eye-witness testimony. Well, that was about the situation here. The only eye-witness,

of course, was Mr. Spenton and his testimony naturally, he was injured himself, and we all know that an accident happening apparently as quick as this did, a person's estimate of time, distance, space and so on is very often not too accurate. So when you actually get down to (374) it the only witness that you have to this accident is the evidence of Spenton, which, of course, was probably handicapped by his own condition, and under those circumstances, under those conditions, it seems to me it is, the ideal case, I should not use the word ideal, but it is such a case that the jury is allowed to draw inferences from all the circumstances. I think I will deny your motion.

Mr. Williams: Exception.

The Court: Because there isn't any particular law involved, that is no serious law I don't think, no question,—I don't think there is any particular serious matter which might have been considered error. I think I will deny your motions and give you an exception. Deny the motion as to each case and on those motions that I reserved on at the close of the plaintiff's case, I reserved decision on Mr. Williams' motion, I will now deny it. At the close of all the evidence I reserved on the motion to dismiss by Mr. Williams, that is the Administrator's case, and I will now deny it. And I reserved on Mr. (375) Gorman's motion to dismiss the plaintiff's case, that is the Transport case against Harshberger, and I will now deny that. So it will stand as a plain jury case in all cases.

Mr. Williams: May I have an exception?

Order and Judgment of the Trial Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil No. 6539

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, Deceased, *Plaintiff*,

— against —

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SPENTON, *Defendants*.

The defendants having appealed from the judgment entered herein on May 18, 1959, and the United States Court of Appeals for the Second Circuit having ordered, adjudged and decreed, on August 29, 1960, that the judgment so appealed from is reversed in accordance with its opinion, with costs of the appeal to the defendants; and that court having taxed said costs in the sum of $755.46 and issued its mandate to this Court to proceed in conformity with the said judgment and opinion; and the said judgment, opinion and mandate of the Court of Appeals having been filed herein; it is hereby, in accordance therewith,

ORDERED, ADJUDGED AND DECREED, that the judgment entered herein on May 18, 1959 is reversed, the motions which the defendants had made that the verdict of the jury be set aside is granted, the motions which the defendants had made during the trial and after verdict that the jury be directed to enter a verdict in favor of the defendants are hereby granted, and it is adjudged that plaintiff has no cause of action against the defendants, and it is

FURTHER ADJUDGED that the defendants recover of the plaintiff the costs awarded by the Court of Appeals in

the sum of $775.46 plus the costs in this court as may be taxed by the Clerk, and defendants have execution therefor.

Utica, New York
Oct. 3, 1960

s/ STEPHEN W. BRENNAN
U. S. D. J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 263-4—October Term, 1959

(Argued March 29, 1960 Decided August 29, 1960)

Docket Nos. 25936-7

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, Deceased,
Plaintiff-Appellee,

v.

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SPENTON,
Defendants-Appellants.

ASSOCIATED TRANSPORT, INC., *Plaintiff-Appellant,*

v.

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, Deceased,
Defendant-Appellee.

Before: WATERMAN and BARNES,* *Circuit Judges*, and SMITH, *District Judge*.

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* Of the Ninth Circuit, sitting by designation.

Defendant appeals from a judgment entered after verdict for plaintiff in the United States District Court for the Northern District of New York, Brennan, *J.*, in a diversity action for wrongful death under §§ 130-134 of the Decedent Estate Law of the State of New York. Reversed.

BARTLE GORMAN, Utica, New York, *for Plaintiff and Defendant-Appellee*; J. Walter Augar, on the Brief.

COPAL MINTZ, New York City, *for Defendants and Plaintiff-Appellant* (Harold Davis, of Counsel).

BARNES, *Circuit Judge*:

Two appeals are here presented from judgments rendered in the United States District Court for the Northern District of New York. The first is by defendants below from a judgment in favor of plaintiff-appellee in the sum of $59,312.50, plus costs, for the alleged wrongful death of appellee's husband, and the second by defendant Associated Transport, Inc., from a judgment against it on its claim for property damage.

This action was brought (according to the judgment, though not so stated in the complaint) under Sections 130 to 134 of the Decedent Estate Law of the State of New York. It is a diversity case. 28 U. S. C. § 1332. This Court has jurisdiction of the appeals. 28 U. S. C. § 1291.

Because the principal appeal is based upon the alleged insufficiency of the evidence to support the verdict, we must consider the facts. Many are undisputed.

A—Undisputed Facts

On April 7, 1956, at about 4:20 A. M., two vehicles approached each other from opposite directions on New York

State Highway 17, about fourteen miles east of Farley and two miles west of Owego in New York State. Plaintiff's intestate was the owner and operator of a 1950 Chevrolet sedan automobile traveling in a generally easterly direction; the defendants were the owner and operator, respectively, of an "International 200" tractor and trailer being driven in a general westerly direction. This latter piece of equipment was forty-two feet long, eight feet wide, and carried a load of 19,000 or 20,000 pounds. New York State Highway 17 at the point of the accident is twenty to twenty-one feet wide and paved. On each side is a four to five foot shoulder. Weather conditions were not good. It had been and was raining steadily that night, and it was dark.

The precise point of impact is in dispute, but it was on the westerly end of a "six degree curve" in Highway 17. To the Chevrolet driver, the curve he was approaching curved to the right, and a macadamized "old" country road, sixteen or seventeen feet in width, continued straight ahead. The tractor-trailer had just rounded the curve to the left when it came to rest after the impact.

The general position of the two vehicles after the accident is not in dispute, although their precise positions are. They were roughly due north of a telephone pole marked (and referred to by witnesses) as "N. Y. S. Eng. 515." This pole was located ten feet south of Highway 17 pavement and within a few feet of the start of the curve to the south. After the accident, the Chevrolet was facing *west* (in the opposite direction to that in which it had been going), partly on the pavement and partly on the south shoulder, and a foot or two north of the pole. The center of the trailer was almost directly opposite the same pole, on the north side of the highway and the north shoulder. The tractor and trailer were jackknifed, so that the trailer headed west and the tractor angled southeast. The right wheels of the trailer were on the northerly shoulder. Both

rear wheels of the tractor were at or near the north shoulder or north edge of the pavement.

The decedent, Harry Harshberger, and his brother, Edwin, had left Johnstown, Pennsylvania, bound for North Adams, Massachusetts, at about 8:00 P. M., Friday night, April 6, 1956. The place of the accident was between two hundred and thirty-six and two hundred and forty-two miles east of the point of departure. Edwin, driving a truck (and familiar with the highway, having traveled it before) was traveling in the lead, and decedent (unfamiliar with the highway) was following behind, generally, four or five car lengths and at times at a greater distance. Decedent had put in a full day's work at his regular occupation as a maintenance man, from 8:00 A. M. to 5:30 P. M., before starting the trip with his brother. Four stops had been made for coffee, food or gasoline.

At the site of the accident, the speed limit was fifty miles per hour. There was no testimony that either vehicle at any time had exceeded this speed. But two witnesses testified as to the vehicles' respective speeds. Edwin Harshberger testified the defendants' vehicle was traveling "fast"[1] when he met it before the accident. He and his brother were traveling forty to fifty miles per hour, a speed

[1] Edwin Harshberger made no precise estimate in miles per hour of defendant Spenton's speed. As Edwin met the tractor-trailer, he testified it was "moving fast."

"Q. You characterize that, Mr. Harshberger, as moving fast? When you testified for Mr. Gorman [attorney for plaintiff] you characterized it as moving fast? A. That's right.

Q. Have you any other or better judgment as to how fast, Mr. Harshberger? A. I could not say the speed of it.

Q. Are you trying to tell me that it was going faster than 60 to 70 miles per hour? A. I am not.

Q. Are you trying to tell me that it was going faster than 25 miles per hour? A. Yes, that I am.

Q. All right, let's start going by mile. Was it going faster than 30 miles an hour?" A. That I wouldn't say.

Q. Was it going faster than 40 miles an hour? A. I can't say the actual mileage."

which he considered "fast," considering the darkness and the weather. The defendant Spenton testified he was going forty miles per hour before the accident, when he first saw the decedent's vehicle on the wrong side of the highway, and that he thereafter slowed to thirty-five miles per hour before the impact.

Edwin, decedent's brother, was not an eyewitness to the impact, as he had successfully met and passed the tractor-trailer, as well as two trucks that were following the tractor-trailer some two hundred feet and more behind it. Edwin testified he was at the time of meeting the tractor-trailer some four to five hundred feet east of the start of the curve, at which time the decedent's Chevrolet was "four or five car lengths" (eighty to one hundred feet) behind Edwin's truck. As Edwin met and passed the tractor-trailer it had its running lights and headlights on, and it was completely on its own or north side of the highway. Edwin continued some distance south and east before stopping. *Edwin Harshberger did not hear the crash of the impact.*

When defendant Spenton first saw the decedent's Chevrolet partially on the wrong or north side of the highway, it was seventy-five to eighty feet ahead. "The closer we got together the more sure I was. I pulled over until I felt my right front wheel hit the shoulder, and at that time we made contact." Spenton further testified he did not know the exact point of the impact. He was hurled from his tractor onto the south side of the highway by the impact and rendered unconscious.

When Spenton saw the decedent's car continue to come toward him partially on the wrong side of the highway, he had snapped his headlight beam low and high several times; he pumped his brakes, and turned to the right. He had less than a second to act before the impact.

The physical damage to the Chevrolet was extensive. Its entire left side almost to the rear wheel, and its left front

over to the right headlight, were severely crushed. The tractor's left front was badly damaged. Photographs of the damage to each vehicle were before the jury.

B—Disputed Facts

(1) There is a dispute as to the precise location of the tractor, and particularly the front wheels thereof, *after* the accident. There was evidence the wheels were completely north of the center line; and there is an inference (the tractor's rear wheels being close to the north edge of the twenty-one foot pavement, and the front bumper of the tractor being fourteen feet five and one-half inches ahead of the rear wheels) that they extended south of the center line. This inference depends upon the angle which the tractor took, facing southeast, *after* the impact. It is no proof as to the position of the vehicles at the time of impact.

(2) There is a dispute as to the distance the decedent's Chevrolet was behind his brother's truck just prior to the accident. Spenton testified the decedent's Chevrolet was two hundred and fifty to three hundred *yards* behind Edwin's truck, rather than the eighty to one hundred *feet* to which Edwin testified.

The physical location of the two vehicles, after the accident, opposite pole 515 lends support to the accuracy of Spenton's testimony as to the distance between the Harshberger brothers' truck and car, rather than to the accuracy of Edwin Harshberger's testimony. Had Edwin been four to five hundred feet east of the juncture of the "old" country road and Highway 17, and the decedent eighty to one hundred *feet* behind Edwin, the tractor and trailer then being thirty to forty feet further east, the impact would necessarily have taken place three hundred and fifty to four hundred and fifty feet east of the juncture and pole 515, rather than within approximately fifty feet of it.

But no matter if the trier of fact rejected defense testimony entirely and accepted plaintiff's version, no evidence

of negligence was thereby proven upon which liability could rest.

(3) There was a dispute as to the existence or non-existence of scrape marks or gouges in the pavement. These were testified to by Officers Davis and Lockwood of the Tioga County Sheriffs Department. They testified they arrived at the scene of the accident at 4:23 A. M. and 4:40 A. M., respectively. They each testified there was a "fresh" scrape mark or gouge in the pavement from a point "approximately in the middle of the west bound lane" east of where the Chevrolet had come to rest, forming an arc to the middle of the Chevrolet forty-seven and one-half feet long at the arc's base. They paced this distance and measured it with a tape measure twice. In the immediate vicinity of that mark there was broken glass and debris on the pavement. There was no debris and no marks elsewhere, at least within the immediate vicinity of the position of the two vehicles at rest, and the scrape mark. Edwin Harshberger testified in rebuttal he had visited the scene of the accident that same morning subsequent to the accident April 7, 1956), but saw no mark as described by the Sheriff's officers. He went to the scene in a police car with someone else. No other witness testified to the absence of the scrape mark. Thus, the only testimony of any physical evidence which might establish the point of impact (whether this testimony be accepted as worthy of credence or not) was that it was within a space fifty feet east of pole 515: a point which Edwin Harshberger testified his brother's vehicle had passed, by at least three-hundred feet, *prior* to the accident. But if the trier of fact found the mark on the highway never existed, this would add nothing to plaintiff's burden to establish liability. It might detract from the credibility of the testimony of the two deputy sheriffs, but adds nothing to plaintiff's case-in-chief.

(4) There is a dispute as to how far Edwin Harshberger traveled beyond the scene of the accident before he stopped.

The witness Halstead, driver of one of the truck and trailers following defendant Spenton, testified he passed a pick-up truck, "painted up," coming off the bridge less than one-half mile east of the scene of the accident. Halstead assumed this was Edwin's truck. Edwin Harshberger denies he traveled that far. Whether he did or not is of no consequence in determining the liability of the defendants.

(5) Appellee raises what she alleges to be a disputed fact: that there was, by Exhibit 14, "proof of the fact that the front left tire on the tractor-trailer closest to and first to contact decedent's vehicle was a flat tire with well-worn tread and in truth a "fairly bare" tire [as stated in summation by appellee's counsel]," that this contradicted appellants' testimony of due care in examining the brakes, tires and lights of the tractor-trailer; that thus "these appellants submitted to the jury a key issue of fact which could be resolved *no other way* than against appellants on the basis of the evidence." (Emphasis by appellee.)

We shall consider this point subsequently.

There is but one legal question before us on the principal case: Was the evidence insufficient, as a matter of law, to justify the submission of the case to the jury?

Appellee emphasizes the evidence which throws doubt (a) upon the existence of the "fresh" scrape mark and "debris" as testified to by Officers Davis and Lockwood; (b) the thoroughness and efficacy with which defendant Spenton "checked" the brakes, tires and lights of his vehicle. But if both points are granted appellee, they subtract from appellants' defense but add nothing to appellee's case. Weakness of proof that the accident occurred on the north or appellants' side of the highway does not prove it occurred on the south, or appellee's side. Nor does weakness of proof of due care, on the part of a defendant, even if it causes such affirmative evidence to be totally disregarded, prove a lack of due care or add one iota of proof of

negligence on the part of that same defendant, if there exists no other proof of such lack. The burden of proof in personal injury actions still remains on plaintiffs. *Cole* v. *Swagler*, 1955, 308 N. Y. 325, 331, 125 N. E. 2d 525; *St. Andrassy* v. *Mooney*, 1933, 262 N. Y. 368, 374, 186 N. E. 867.

Appellee urges that the flashing of defendants' lights was "ample evidence of negligence"; relying on Section 15(3) of the Vehicle and Traffic Law of the State of New York. The only evidence in the record is that this occurred when the two vehicles were seventy-five to one hundred feet apart, approaching each other at admitted and equal speeds of at least forty miles per hour; each traveling at least sixty feet per second, and by any calculation, closer to one second than two seconds apart before the impact. At that time the only evidence in the record is that decedent's vehicle was partially across the center line and appellants' vehicle was not. Even were we to find some possible evidence of negligence in raising or lowering the headlight beams at the last moment (which we do not), there is a complete and absolute lack of proximate cause. *Cole* v. *Swagler*, *supra*. Prosser, Law of Torts, §§ 47-50 (2 ed. 1955).

Appellee relies on a claim that the front left tire of the tractor was "somewhat bare" and flat, as disclosed by Exhibit 14, taken after the accident. The language "somewhat bare" (whatever that may mean) appears in this case for the first time in appellee's brief (p. 16). In her counsel's argument to the jury, the tire was described as "fairly bare" (whatever that may mean). There is not the slightest evidence the tire was flat before the accident, and it is hardly to be expected it would not be flat after the impact, terrific as it was. No witness testified as to whether it was flat or not, before or after the accident. We have carefully examined plaintiff's Exhibit 14, and particularly the left front tire in question as it appears in the photograph. While the photograph was obviously

taken to show the general damage to the front of the tractor, and not specifically the tire, we are unable to say whether it was flat or not, *after* the accident. But if it was, that fact is immaterial. It is readily apparent that the tread design appears on the tire; there is no "smoothness," if by smoothness is meant a lack of tread. We are not certain we understand what counsel means by describing the tire as "somewhat" or "fairly" bare. The photograph discloses "somewhat more" of a tread than a lack of it. The weakness of this argument relied upon by appellee is the fact disclosed by a careful examination of the record—that nowhere during the trial did appellee's counsel seek to establish by pleading or the introduction of any evidence or by the examination of any witness that the tire of the left front wheel of the tractor was "somewhat" or to any degree "bare." It is only in argument to the jury, and to this Court, that such an interpretation of the photograph springs full-blown to life.

The specifications of negligence in the complaint were speed; failure to stay on the proper side of the highway; failure to give warning; failure to give aid and assistance in attempting to pass; and that the defendants otherwise violated the laws and statutes of the State of New York.

This is not a case where a plaintiff discovers some fact during the course of the trial, perhaps by reason of the testimony of a defendant or some other witness, and seeks to add some new theory or an additional charge of negligence to that which already exists. This photograph (Exhibit 14) which now allegedly tells so much with respect to the defendants' tractor, and particularly its left front tire, was introduced in evidence by the plaintiff-appellee. It had been in her counsel's possession before the trial. When it was introduced in evidence no question was asked concerning the tread or flatness or appearance of the left front tire. And in argument, but a passing reference was made to it by appellee's counsel. Even in

such passing reference, it apparently was with difficulty that her counsel stated the existence of the fact, now declared important as well as obvious, *i.e.*, that the tire *was* bare or smooth or worn.[2]

Appellee urges that the evidence was sufficient to go to the jury. She relies on the rule that "in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence." *Noseworthy* v. *City of New York*, 1948, 298 N. Y. 76, 80, 80 N. E. 2d 744. In other words, but slight evidence of negligence is necessary. *Wank* v. *Ambrosino*, 1954, 307 N. Y. 321, 121 N. E. 2d 216. With this rule we have no quarrel. But we have yet to find a precedent holding that where there is no evidence of a defendant's negligence that such case must go to a jury—absent a *res ipsa loquitur* factual situation, a case of absolute liability, or the adoption of the rule of liability without fault. There being no facts in this case calling for the adoption of the first two principles, and New York not having as yet adopted what Dean Roscoe Pound has described as the doctrine of the involuntary Good Samaritan,[3] we find no basis for claiming that any negligence of a defendant existed in this case. The burden of such proof is on the appellee below. There being no such proof, the judgment rests purely on conjecture and surmise, no cause of action has been established, and the judgment must be, and is reversed.

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[2] Counsel for appellee's complete statement was: "I want you [the jury] to see whether that looks to you like a fairly bare tire. I want you to look that over. * * * Now, is that tire bare? Did it fail to get him around the turn? * * * Did the bare tire, and you can see it is bare, did it give out and assist his passing over into territory where he should not have been. * * * [Y]ou can make the inference that this accident happened on Mr. Harshberger's side of the road * * * with that tire being bare."

[3] Pound, Editorial, Modern Trends in Tort Law, 16 NACCA L. J. 21, 35 (1955).

Appellee has filed with this Court the "Case on Appeal," together with the "Exhibit Volume" in the four cases each entitled *Faust* v. *Central Greyhound Lines, Inc.*, cases in which counsel for this appellee appeared as counsel for the defendant. We do not find in them a similar factual situation.[4]

---

[4] In the *Faust* cases, decided November 24, 1948, the Court of Appeals of New York said:

> "The actions were originally tried at a Trial Term and verdicts were in favor of the plaintiff in each of the four cases. On appeal from the judgments entered upon the verdicts, the Appellate Division reversed on the ground that the verdicts were against the weight of the evidence. 271 App. Div. 948, 68 N. Y. S. 2d 441, 442. The cases were subsequently tried before the court and a jury and verdicts in favor of the plaintiffs were returned. Judgments on the verdicts were reversed by the Appellate Division, and the complaints dismissed. 273 App. Div. 1055, 79 N. Y. S. 2d 763; 273 App. Div. 1055, 79 N. Y. S. 2d 764; 273 App. Div. 1055, 81 N. Y. S. 2d 177, and the plaintiffs' appeal.
>
> Latimer B. Senior, of Utica (Bartle Gorman, of Utica, of counsel), for respondent.
>
> In each case: Judgment of Appellate Division reversed and the action remitted to that court for determination upon questions of fact there raised (Civil Practice Act, Sec. 606), with costs to abide the event, on the ground that in each case the evidence presents questions of fact as to the defendant's negligence, and in the first case as to freedom from contributory negligence on the part of plaintiff's intestate."

Faust v. *Central Greyhound Lines*, 1948, 298 N. Y. 721, 83 N. E. 2d 138.

The second Supreme Court, Appellate Division, reversal was *per curiam*, dated May 12, 1948, and had been based "on the ground that the finding of negligence on the part of the driver of defendant's bus is without evidence to support it." *Faust* v. *Central Greyhound Lines*, 1948, 79 N. Y. S. 764 at 765.

On December 29, 1948, on remission from the Court of Appeals, the judgment and order was reversed on the facts and a new trial granted on the ground the verdict was against the weight of the evidence. *Faust* v. *Central Greyhound Lines*, 1948, 86 N. Y. S. 2d 651, 652, 654. We find no subsequent reference to the cases in the reports, and fail to see how any decisions therein are controlling here.

We have also been furnished by counsel for appellee a copy of the decision of the New York Court of Appeals, rendered March 3, 1960, in the matter of *People* v. *Meola*, 7 N. Y. 2d 391, 165 N. E. 2d 851. That case upholds the constitutionality of Subdivision (3) of Section 15 of the New York Vehicle and Traffic Law, which prohibits operating a vehicle, under certain circumstances, "so that a dazzling light * * * interfere[s] with the driver of the approaching vehicle." It holds that the words "dazzling" and "interfere" are not so uncertain, indefinite or vague as to render the act unconstitutional. We accept that ruling as controlling, but find it does not control the instant case in any way.

Having determined that the evidence was insufficient as a matter of law to justify the submission of the case to the jury, appellants request us to reverse the judgment, set aside the verdict, reverse the denial of defendants' motion for final judgment, and remand the cases to the District Court to act upon the two motions, allegedly heretofore unacted upon, to dismiss the complaint upon the ground the evidence was legally insufficient.

Such motions to dismiss were made at the end of plaintiff's case below, and after all evidence was in. These motions to dismiss were considered by both parties below, and by the trial court, as the equivalent of a motion for a directed verdict, properly made in jury cases. *Cf.* Rules 41 and 50, Federal Rules of Civil Procedure.

The record shows, however, that each of such motions were acted upon, after the verdict had been returned, at the same time appellants' motion to set aside that verdict was made and denied. (Appellants' Appendix, pp. 203, 204.)

All such motions, as so interpreted, were proper, and preserved appellants' rights. *Cone* v. *West Virginia Paper Co.*, 1947, 330 U. S. 212.

The judgment in favor of the plaintiff-appellee is reversed.

The jury having determined that there was no liability on the part of Harshberger to Associated Transport, Inc., we will not disturb that verdict, and Associated's request for a new trial on that issue is denied.

Reversed in part, and *affirmed* in part.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 548

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of HARRY NELSON HARSHBERGER, Deceased,

Petitioner,

v.

ASSOCIATED TRANSPORT, INC. and FLOYD KENNETH SPENTON,

Respondents

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COPAL MINTZ,
Attorney for Respondents,
150 Broadway,
New York City

ACKERMAN PRESS, Phones BO 9-7107-8

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 548

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of HARRY NELSON HARSHBERGER, Deceased,

Petitioner,

v.

ASSOCIATED TRANSPORT, INC. and FLOYD KENNETH SPENTON,

Respondents.

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

General Statement

This case is only a routine death action under Sections 130-134 of the Decedent Estate Law of the State of New York,[1] predicated upon allegations of *negligence* in the

[1] As far as pertinent here, section 130 provides that the personal representative "of a decedent who has left him or her surviving a husband, wife or next of kin may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. . . ." and section 131 provides: "On the trial of an action to recover damages for causing death the contributory negligence of the person killed, shall be a defense to be pleaded and proven by the defendant".

operation of a motor vehicle on a highway *in New York*. The action is in the Federal courts solely because of *diversity* of citizenship.

We fail to see in petitioner's "Reasons for Granting The Writ" anything exceptional or of general or even of special interest sufficient to constitute a "special and important reason" for a review by this Court. Moreover, whatever force there may be in the petition is dissipated by documents which the petition overlooks and which are appended hereto.

In truth, as we show in the succeeding pages, of the two questions sought to be considered, (1) the procedural question *is not present at all*, and (2) the substantive question is purely one of state law, not shown to have been applied erroneously and as to which this Court accords to the Courts of Appeals sitting within the state an expertness superior to its own (*United States of America* v. *Durham Lumber Co.*, 363 U. S. 522 (1960); *Proper* v. *Clark*, 337 U. S. 472, 486-487 (1949)).

I

The procedural question which the petition stresses does not arise in this case; petitioner's presentation thereof rests upon a mis-reading of the decision of the Court of Appeals and a disregard of the judgment entered by the Court of Appeals and of the mandate it issued and of the subsequent proceedings before the District Court which resulted in the entry of the latter's judgment.

A proper reading of the decision rendered by the Court of Appeals (Petition, pp. 4a-17a) shows that it does not contain a direction of a verdict or of judgment in favor of the respondents nor a direction to the trial court that it direct a verdict and enter a final judgment in favor of the respondents. Similarly, the formal judgment which the

Court of Appeals entered (reproduced in the Appendix hereto, at p. 19, *infra*) and which constituted the mandate[2] to the District Court, were devoid of such a direction.

The appeal to the Court of Appeals—in the death action (the only one material here)—presented to that Court the substantive issue of whether, under the law of New York, a *prima facie* case had been made out for submission to the jury. After a thorough consideration of the record, the Court of Appeals pronounced the conclusions that "the evidence was insufficient as a matter of law to justify the submission of the case to the jury", that the several motions which appellants had made in the trial court, as construed by that court, "were proper, and preserved appellants' rights" and, accordingly, "the judgment [in the death action] . . . . is reversed" (see pp. 14a-17a of the Petition). Thereupon the Court of Appeals entered a judgment which simply "Ordered, Adjudged and Decreed that the judgment of the said District Court be and it hereby is reversed in accordance with the opinion of this court; with costs to the appellants" (see p. 20, *infra*). Since that constituted the Court's mandate, the Court of Appeals simply directed the District Court to proceed in conformity with that judgment and opinion.

Thus, neither the opinion nor the judgment nor the mandate of the Court of Appeals contained a determination as to whether there should be a final disposition or a new trial. It made no direction to the District Court in that regard. That was in accord with the respondents' argument to the Court of Appeals ("Appellants' brief, pp. 37 to 42" filed by petitioner), that it should abstain from ordering a new trial and leave to the District Court the

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[2] Rule 28(b) of the Rules of the Court of Appeals for the Second Circuit provides: "Unless otherwise directed by the court no formal mandate shall be prepared, but it shall suffice for the clerk to send to the proper court a copy of the opinion and order of this court and a certified copy of the judgment of this court".

disposition of the case following a reversal of the judgment. Respondents argued that *Johnson* v. *New Haven & Hartford R.R.*, 344 U. S. 48, was not an authority to the effect that "the appellants may have no relief other than a new trial" but only that the "Court of Appeals was without power to grant final judgment or to mandate the District Court to grant final judgment" because thereby it would deprive "the District Court of an opportunity to determine whether, upon the verdict being set aside, there should be a new trial or a final judgment". Hence, it "would be equally erroneous", respondents continued, for the Court of Appeals to direct "a new trial, on the ground that, in the circumstances of this case, it has no power to enter final judgment" since such a direction also "would deprive the District Court of its primary jurisdiction to decide whether the setting aside of the verdict should be followed by final judgment or by a new trial" (pp. 38-39 of the Appellants' brief in the Court of Appeals).

After the Judgment and Opinion of the Court of Appeals were filed in the District Court, respondents applied to the latter, as was their right, for a final judgment. They did so by serving upon the attorneys for the petitioner a proposed judgment with notice that it would be presented at a specified time and place to the Trial Judge "for settlement and entry". A copy of that notice is appended hereto (p. 21, *infra*). It was served by mail on September 16, 1940. It was returnable on September 23rd. On September 22nd, Mr. J. Walter Augar of the office and in behalf of the then attorney for petitioner, telephoned respondents' attorney that he had no objection to the proposed judgment except that he felt that a mistake had been made by the Court of Appeals in the amounts of costs which had been awarded and he wanted the entry of judgment withheld until a correction of the costs was made by the Court of Appeals. Respondents' attorney replied that the matter of costs was of little moment to him and that, rather than have any proceedings in respect thereto, he was prepared

to stipulate to an adjustment and the entry of judgment should not be held up on that account. Mr. Augar replied that nevertheless he would appear the following morning before Judge Brennan and urge delay pending revision of the costs.

Since respondents' attorney was in New York City and the presentation of the judgment was to take place at Utica, he requested Mr. Augar to state to Judge Brennan his position. Subsequently, respondents' attorney received from petitioner's attorney a letter dated September 23, 1960 which is reproduced in the Appendix (at p. 22, *infra*). With it came two proposed orders for entry by the Court of Appeals and stipulations therefor—one in the death action here involved and the other in the counteraction. Since only the former of these is germane, that one is reproduced in the Appendix hereto (at pp. 23-25, *infra*). Those papers provided for an amendment of the judgment and mandate in respect only to the amount of costs, to read: "On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it is hereby reversed in accordance with the opinion of this court; with costs to the appellants in the sum of $395.23".

There followed a letter from Judge Brennan dated September 28, 1960, which is reproduced in the Appendix hereto (at pp. 25-26, *infra*). The material portion thereof is that petitioner's sole objection to the proposed judgment was "some dispute as to the matter of costs which apparently must be settled in the Circuit Court" and which was in the process of negotiation and "under the circumstances" the "proposed judgment" was being held by the Judge "without action awaiting further information from counsel involved".

Then followed communications from respondents' attorney to petitioner's attorney and to Judge Brennan dated September 29, 1960 which are reproduced in the Appendix hereto (at pp. 28-30, *infra*). The substance thereof

was that respondents' attorney saw no need for an application to the Court of Appeals in regard to the costs since he stood ready to enter into a stipulation reducing the amount and to file a *pro tanto* satisfaction and, therefore, it was respectfully urged "that the submitted judgment be signed and entered."

No further opposition was presented by or in behalf of the petitioner and on October 3, 1960 the trial court (Judge Brennan) signed the judgment as proposed and as it appears at pages 3a-4a of the Petition.

Had petitioner desired a new trial, her attorney would have objected to the provisions in the proposed judgment directing "a verdict in favor of defendants" and adjudging "that plaintiff has no cause of action against the defendants" (see Petition, p. 3a) and would have asked for a new trial. Petitioner's attorney had ample opportunity to do that, following his receipt of respondents' application to the trial court. He utilized that opportunity to raise an objection to the costs which the Court of Appeals had expressly awarded, but he did not object to any of the proposed provisions and did not claim that the petitioner should be given a new trial rather than be put out of court. Neither in her principal brief to the Court of Appeals nor upon the argument nor in the additional brief which she submitted after the argument, did petitioner suggest that if the judgment were reversed, she would desire a new trial. The same disinterestedness in a new trial, it is obvious, continued after the decision of the appeal. The reason therefor is made manifest by the record, for it is clear therefrom that a new trial could not possibly serve any beneficial purpose, the petitioner having presented at the trial all that could possibly be adduced. That, plainly, as appears from the post-mandate proceedings above outlined and documented at pages 21-30, *infra*, was the considered view of petitioner's attorney. The point seems to be raised now only as an after-thought, not for its intrinsic value or possible benefit to petitioner but

solely in the hope that thereby this Court will be induced to undertake a review of the case and, possibly, upon such review it might disagree with the Court of Appeals that, under the applicable law of New York, a case had not been made out for submission to the jury.

However, since, in this case, the Court of Appeals did not render or direct the final judgment which was entered and *that judgment was rendered by the District Court in the exercise of its jurisdiction* and (in the respects now challenged) *with the full acquiescence of the petitioner*, the procedural question which petitioner seeks to raise is not presented.

II

The Court of Appeals correctly applied the applicable New York Law; its decision is in accord with the New York cases and petitioner's claim of error is contradicted by those cases and is wholly without basis.

The Petition, as we read it, fails to make out a case for the departure by this Court from its traditional reluctance (see cases *supra*, p. 2) to review the decisions of Courts of Appeals on State law. There certainly is no showing that the decision of the Court of Appeals is "clearly erroneous or unreasonable". On the contrary, it is abundantly clear from its opinion that the Court of Appeals examined the evidence with meticulous care and thoroughness and found it insufficient as a matter of law under the applicable decisions of the New York Court of Appeals.

(1). Petitioner does not claim that the Court of Appeals relied on the wrong New York decisions or misunderstood the applicable cases or failed to take into account decisions at variance with those cited. Beyond all question, the Court of Appeals correctly stated that under the law of New York plaintiff in an action for wrongful death has the

burden of establishing negligence, that liability may not be conjectured or surmised but must be established, and that the rule is applied strictly as to its requirement that there be real proof of at least some negligence (*Wank* v. *Ambrosino*, 307 N. Y. 321 (1947); *Cole* v. *Swagler*, 308 N. Y. 325 (1955) and cases therein cited; cf. *Miller* v. *Farrell Lines*, 247 F. 2d 503, (2d Cir., 1957) and *Eckenrode* v. *Pennsylvania RR.*, 164 F. 2d 996 (3rd Cir., 1947)).

In the *Wank* case, the evidence showed that after stopping for a traffic light, turning a corner and proceeding a short distance, the operator of an automobile, feeling a bump and hearing a noise, stopped, and upon inspection discovered a man under his car. The man died soon afterwards. No one knew how he had gotten underneath the car. There were "drag marks" for about 170 feet away from where the car stopped. Such was the evidence upon which the plaintiff in that case rested. Defendants moved for the dismissal of the complaint. That motion was granted. The judgment of dismissal was affirmed by a divided Appellate Division. Affirming that judgment, the New York Court of Appeals said (at pp. 323-4):

> "An inference could be justified that defendants' car hit the man, but, since there is nothing at all to show how that came about, there is nothing on which to base a finding of negligence causation. True it is that 'in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence' (*Noseworthy* v. *City of New York*, 298 N. Y. 76, 80) but before that rule comes into play there must be some showing of negligence, however slight. *Noseworthy*, and similar cases, describe a method of, or approach to, weighing evidence, but there must be a showing of facts from which negligence may be inferred. Here there was none. The statement by one witness that there were 'drag marks' on the street

was denied by another of the plaintiff's witnesses who was equally positive that they were 'tire marks'. Only by a process of pure conjecture could such testimony be a basis for a verdict of negligence."

There also appears the following in that case: "The driver had a defect in the vision of his left eye but there is nothing to show that it interfered with his safe operation of an automobile."

In the *Cole* case, an automobile which had proceeded on a four-lane dry highway at 3:30 A. M. and had just passed a Sheriff's patrol car, was found "resting in the field about ten feet from the edge of the road, on the right side. The car was 'sheered right in half', with only wires and cables still connecting the front and rear halves; the front lights were still lit. The right-hand door of the car had been torn off." One man "was lying on the ground outside the left forward section of the car with one foot 'wedged up' between the bottom of the partly open left front door and the running board". He was still alive, but unconscious and badly injured. He died three days later. Another man was found dead inside the car to the right of the steering wheel with his buttocks seated on the right side of the car, with his feet "to the right of the mid-line of the car . . . where a passenger's feet would be". The car had traveled 177 feet after leaving the highway and within that distance struck two trees (the first of these about twenty feet from the point where it left the highway and another somewhat beyond); the car uprooted one of those trees (which was six inches in diameter) and stripped the bark from the other, and it also passed through some bushes.

Upon those facts, in an action for the death of the man who had died instantly against the estate of the one who had survived the accident, a jury, after 73 minutes of deliberation, brought in a verdict for the plaintiff. The judgment thereon was unanimously affirmed by the Appellate Division.

The New York Court of Appeals, however, *reversed*, holding that while, in the absence of eye witnesses to a death causing accident, a jury, from the circumstantial evidence, "may reconstruct the circumstances surrounding the accident" and the "plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence" and "reasonable inference may be drawn from the evidence", the evidence must be such that there may be reasonably inferred therefrom "all the facts necessary to establish the cause of action—i.e., negligence *and* proximate cause" (at p. 329). In exposition of the insufficiency of the evidence outlined above, the New York Court of Appeals said (at p. 330):

> "(2) From the physical circumstances . . . , the jury had the right to find that when Swagler's car left the road it was traveling at a high rate of speed. Whether it was in excess of the State-wide maximum speed of fifty miles per hour (Vehicle and Traffic Law, § 56, subd. 3), however, cannot be determined upon the scanty facts in this record . . . that has not been established here. Even beyond this, however, as we have often stated, there can be no inference of additional negligence, such as the failure to keep a lookout or maintain control, based on the mere fact that the car left the road (*Galbraith* v. *Busch*, *supra*; *Lahr* v. *Tirrill*, 274 N. Y. 112, 117; *Marinan* v. *Kronberger*, 280 N. Y. 640; *Epstein* v. *Cohen*, 288 N. Y. 307). As we said, per Crouch, J., in *Tortora* v. *State of New York* (269 N. Y. 167, 170): 'When an automobile swerves and leaves the road for no definitely assignable reason, it is altogether possible that the accident was due to either of several causes, the failure of the steering gear or a lapse on the part of the driver. Both frequently happen. . . . In all such cases the balance of probabilities between causes which entail liability and others which do not is equal enough so

that an inference of fact which entails inability is the result of mere speculation.' Thus, it does not appear to us that a case of negligence has been made out on this record."

(2). The Court of Appeals, as was its duty, tested the evidence in the record by those rules. Petitioner does not claim that the Court overlooked or misapprehended anything in the record. In fact, there is nothing in the record which is not fully reflected and considered in the opinion. The Court examined and considered all that could be found in the record which was in any way helpful to the petitioner's cause and it could find therein no evidence whatever of negligence.

(3). It should be noted that petitioner's summary of the evidence is not as accurate, complete or objective as that contained in the court's opinion. For example, the tractor-trailer was not 60 feet long but in the neighborhood of 40 (see pp. 151-152, "Appellants' Appendix in the C. of A.); the testimony of the decedent's brother that the decedent was five car lengths behind him is not reconcilable with the physical facts (see Petition, p. 9a), but, as the Court of Appeals said, "no matter if the trier of fact" accepted that testimony since no negligence on the part of Associated's driver was thereby shown (see Petition, pp. 9a-10a); petitioner omits to state that decedent's car after the accident came to rest with its front facing west and thus, after the impact, circumscribed a complete about face ("Appellants' Appendix" in the Court of Appeals, pp. 49, 122, 128; Ex. C); the measurements in the record do not justify the statement that when the tractor-trailer came to rest "the front end of the tractor projected 4 feet 5½ inches south of the center line of the highway" (see Petition, p. 9a, first item under "Disputed Facts").

(4). But even the petitioner's biased summary and her argument thereon fail to indicate that there was presented

at the trial any evidence of negligence on the part of respondents.

(i). On the question of whether the impact occurred within the north or the south half of the road:

(a) The facts, not mentioned in the petition, that the decedent's car when it came to rest on the south part of the road faced west—that is in the direction opposite to which it had been going—and that the major damage was to the front half of the left side, far from evidencing that the collision took place in the south half of the road, tends to establish that it was on the north half, since, obviously, the vehicle needed space in which to turn around as it circumscribed a right turn-about—right because the physical condition of the car showed plainly that it had been struck on its left side and thus must have been propelled rightward; therefore, the position and location of the decedent's car after it came to rest tend to prove that the point of impact was on the north half of the road, precisely as testified to by respondent Spenton whom petitioner called as a witness.

(b) The decedent's brother's testimony that when he had last observed the decedent the latter was in the south half of the road is of no value because the same brother testified that at the same time the Associated truck was seen by him well within the north half of the road. Obviously, there is no basis for speculating that after the brother's simultaneous sighting of the decedent car and the tractor-trailer the latter rather than the decedent's car went into the wrong lane.

(c) The presence of the tractor-trailer as far to the north as it could have gone with just the front of the jackknifed trailer protruding partly into the south lane certainly presents no evidence that it was in the south lane at the point of impact, since the jackknifing obviously was caused by the impact.

(d) That the driver of the tractor-trailer, hurled from his cab leftward, landed in the south half is no evidence that the tractor was on the south half since on being propelled leftward he necessarily landed some distance away from the vehicle; on the contrary, that fact indicates that the collision took place on the north half rather than the south.

Therefore, there is not a shred of evidence justifying an inference that the collision occurred on the south half of the road; everything in the case points to the contrary.

Furthermore, even if it were permissible to infer that the collision occurred on the south half of the road, that in and of itself, under the law of New York, would not be evidence of negligence—in a death case any more than in any other action arising out of a collision of motor vehicles. That rule is well established in New York (*Cole* v. *Swagler*, *supra*, 308 N. Y. 325, 330; *Marinan* v. *Kronberger*, 280 N. Y. 640; *Lahr* v. *Tirrill*, 274 N. Y. 112; *Tortora* v. *State of New York*, 269 N. Y. 167, 170; *Galbraith* v. *Busch*, 267 N. Y. 230; *Hollenbeck* v. *Hollenbeck*, 286 App. Div. 937; *Lo Piccolo* v. *Knight Rest Products Corp.*, 7 A. D. 2d 369).

(ii). The assertion that the accident was caused by speeding on the part of the tractor-trailer is directly contrary to the evidence of both the decedent's brother and Spenton, the driver ("Appellants' Appendix" in the Court of Appeals, pp. 40, 47, 61, 62, 90-91, 93-94, 111).

(iii). Nor is there any substance to the claim that negligence was shown in the fact that the driver of the tractor-trailer, in the desperation of an oncoming impact, applied his brakes and, to alert the decedent to his danger, flashed his lights. Should the truck driver not have applied his brakes? Should he not have steered to his right as far as he could? Should he not have taken all the means available to warn the decedent that he was on the wrong side of the road? Apparently, petitioner's trial counsel could perceive no negligence in what Spenton did in his vain effort to avoid the impact, for, in his summation to the jury, he did not mention any of them as acts or evidence of negligence (See "Appellants' Appendix" in the Court of Appeals, pp. 186-197).

Furthermore, the rule in New York is that one's "conduct, precipitated . . . . by an emergency not of his own making, [is] as a matter of law, insufficient to create liability" (*De Carlo* v. *Falco*, 8 N. Y. 2d 791 (1960)). Accordingly, where the defendant to avoid an oncoming automobile went into the wrong lane and at the same time the oncoming automobile got back into its right lane, the New York Court of Appeals reversed a judgment in favor of an innocent passenger and dismissed the complaint because "even if the choice of turning onto the wrong side of the road was unfortunate" it was "a mere error of judgment" to meet an emergency created by another and, as a matter of law, is not negligence. The rule is expressed succinctly in *Polk* v. *New York Central RR. Co.*, 10 A. D. 2d 703 (1960), a death case: "Defendants may not be cast in judgment merely because of an error in judgment in an emergency (*Kawacz* v. *Delaware, L. & W. R. R. Co.*, 259 N. Y. 166, 169 [also a death case]; *Leslie* v. *Robinson*, 267 App. Div. 967, affd. 293 N. Y. 911 [another death case])".

Consequently, at the trial nothing which had been brought out in the evidence was pointed to as estab-

lishing negligence. On the contrary, petitioner's trial counsel told the jury that "what happened . . . is in the realm of ignorance" ("Appellants' Appendix" in the C. of A., pp. 190-191), and he argued that nevertheless the jury could "make the inference that this accident happened on Mr. Harshberger's side of the road and was caused by some [*unidentified*] dereliction of duty by both Associated Transport, Inc., with that tire being bare, and this driver, Mr. Spenton" (at p. 197). The only thing concrete that he suggested to the jury, by way of evidence of negligence, was the claim of "fairly bare tire" (at p. 191) and "that tire being bare" (at p. 197), of which no evidence whatsoever had been given.

(iv). That bare tire argument, although asserted for the first time in summation, was carefully considered by the Court of Appeals, and disposed of as follows:

> "There is not the slightest evidence the tire was flat before the accident, and it is hardly to be expected it would not be flat after the impact, terrific as it was. No witness testified as to whether it was flat or not, before or after the accident. We have carefully examined plaintiff's Exhibit 14, and particularly the left front tire in question as it appears in the photograph. While the photograph was obviously taken to show the general damage to the front of the tractor, and not specifically the tire, we are unable to say whether it was flat or not, *after* the accident. But if it was, that fact is immaterial. It is readily apparent that the tread design appears on the tire; there is no 'smoothness,' if by smoothness is meant a lack of tread. We are not certain we understand what counsel means by describing the tire as 'somewhat' or 'fairly' bare. The photograph discloses 'somewhat more' of a tread than a lack of it. The weakness of this argument relied upon by appellee is the fact disclosed

by a careful examination of the record—that nowhere during the trial did appellee's counsel seek to establish by pleading or the introduction of any evidence or by the examination of any witness that the tire of the left front wheel of the tractor was 'somewhat' or to any degree 'bare'. It is only in argument to the jury, and to this Court, that such an interpretation of the photograph springs full-blown to life.

The specifications of negligence in the complaint were speed; failure to stay on the proper side of the highway; failure to give warning; failure to give aid and assistance in attempting to pass; and that the defendant otherwise violated the laws and statutes of the State of New York."

(v). Petitioner's new conjecture that Spenton's sudden application of his brakes "on a rain swept macadam highway could readily have caused the tractor-trailer to skid and to start to jackknife before the collision, thus striking the decedent in his own lane of the highway" is stillborn: (a) There was no evidence of a skid; the evidence was to the contrary ("Appellants' Appendix" in the C. of A., pp. 82, 118). (b) The fact, established conclusively by the photographs (Exs. 10-14 and C), that the impact was between the left front of the tractor and the left front of the decedent's car, conclusively eliminates the conjecture that the tractor had jackknifed with the trailer before the impact, since the jackknifing was leftward and in its jackknifed position that side of the trailer could not have come into contact with decedent's oncoming car. (c) Under the law of New York, skidding, *per se*, like being on the wrong side of the road, is no evidence of negligence (*Cole* v. *Swagler*, *supra*; *Marinan* v. *Kronberger*, *supra*; *Lahr* v. *Tirrill*, *supra*; *Tortora* v. *State of New York*, *supra*; *Galbraith* v. *Busch*, *supra*; *Hollenbeck* v. *Hollenbeck*, *supra*;

Lo Piccolo v. *Knight Rest Products Corp., supra*). (d) It is unthinkable that any heed be given to an argument that Spenton should not have applied his brakes. (e) Under New York law, as quoted above, liability cannot be predicated upon what Spenton did in his effort to meet the emergency. (f) As demonstrated at pages 12-13, *supra*, there is no basis for the contention that the collision was on decedent's "own lane of the highway".

(5). The foregoing discussion comprehends every point and argument which petitioner presented to the Court of Appeals and also the new contention referred to in the preceding paragraph. As to the points and arguments which had been submitted to the Court of Appeals, it seems to us patent that the petition fails to cast any doubt on the correctness of the Court's inability to perceive therein any evidence of negligence under the rules and standards laid down by New York decisional law. Petitioner's new argument, it seems certain, does not add to her case. Respondents, therefore, could very well have rested on the comprehensive opinion of the Court of Appeals. However, in amplification, we have added the last six pages as a direct answer to petitioner's argument at pages 16-19 of its petition.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

COPAL MINTZ,
Attorney for Respondents.

December 15, 1960.

APPENDIX

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of August one thousand nine hundred and sixty.

Present: HON. STERRY R. WATERMAN,
HON. STANLEY N. BARNES,
Circuit Judges,
HON. J. JOSEPH SMITH,
District Judge.

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, deceased,

Plaintiff-Appellee,

v.

ASSOCIATED TRANSPORT, INC. and FLOYD KENNETH SPENTON,

Defendants-Appellants.

Appeal from the United States District Court for the District of

This cause came on to be heard on the transcript of record from the United States District Court for the District of , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court; with costs to the appellants.

A. DANIEL FUSARO
Clerk

By:

Niall F. O'Doherty
Chief Deputy Clerk

Notice of Application to District Court for Final Judgment

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

CIVIL No. 6539

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, deceased,

Plaintiff,

against

ASSOCIATED TRANSPORT, INC. and FLOYD KENNETH SPENTON,

Defendants.

SIR:

PLEASE TAKE NOTICE that a proposed judgment, of which the annexed is a true copy, will be presented, on the 23rd day of September, 1960, at 10:30 A.M. to the Hon. Stephen W. Brennan, U.S.D.J., at his Chambers, United States Courthouse, Post Office Building, Utica, New York, for settlement and entry.

Dated: New York, N. Y., September 16, 1960.

Yours, etc.,

COPAL MINTZ
Attorney for Defendants
150 Broadway
New York 38, N. Y.

To:

BARTLE GORMAN, Esq.
Attorney for Plaintiff
100 Genesee Street
Utica, New York

Letter From Petitioner's Attorney

BARTLE GORMAN
ATTORNEY AND COUNSELOR AT LAW
110 Genesee Street
Utica, New York

J. WALTER AUGAR
EDWIN A. WASZKIEWICZ

September 23, 1960

Copal Mintz, Esq.
150 Broadway
New York, New York

RE: Harshberger vs Associated Transport
(2 actions)

Dear Mr. Mintz:

In accordance with our telephone conversation of yesterday, I appeared before United States District Judge Stephen W. Brennan this morning. I believe that the trial in which Judge Brennan was engaged terminated last night.

Judge Brennan stated that he had received no original papers from you and the clerk likewise stated that he had received no original papers from you. In view of this Judge Brennan felt that there was nothing official before him to decide or upon which to take any action.

Likewise, in accordance with our discussions, enclosed herewith please find two proposed stipulations and two proposed orders. These appear to be self-explanatory and, if they meet with your approval, it will be appreciated if you will take the necessary action to put them into effect. Following this, this office will have no objection to your proceeding with a proposed amended judgment and notice of settlement (as you had intended to do today), assuming that you will extend the same courtesy to our proposed amended judgment and notice of settlement.

Once again, congratulations upon your success. With kind personal regards we remain,

Very truly yours,

BARTLE GORMAN
By J. WALTER AUGAR

JAW/s
enc.

Order and Stipulation Proposed By Petitioner and Enclosed With Letter of September 23, 1960.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, Deceased,

Plaintiff-Appellee,

vs.

ASSOCIATED TRANSPORT, INC. and FLOYD KENNETH SPENTON,

Defendants-Appellants.

Upon the annexed stipulation, it is

ORDERED that:

1. The final paragraph of the judgment of this court herein, dated August 29, 1960, and filed in the office of the Clerk of this Court on August 29, 1960, be amended to read; "On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it is hereby reversed in accordance with the opinion of this court; with costs to the appellants in the sum of $395.23".

2. The bill of costs herein (#263, October Term, 1959) be amended to reduce the costs of printing the appendix from $740.46 to the sum of $370.23 and the total sum shown in said bill of costs should be reduced from the sum of $765.46 to the sum of $395.23.

3. The mandate of this court, previously issued herein, be amended to reflect the foregoing.

4. The Clerk of this Court be and he hereby is ordered to amend the judgment and the bill of costs and the mandate herein as indicated above and to send a proper amended mandate to the Clerk of the United States District Court for the Northern District of New York.

5. That this order is without prejudice to the right of any party to appeal or otherwise seek review of the judgment herein.

DATED: New York, New York.

, 1960.

ENTER,

Proposed Stipulation

[SAME TITLE AS ON PRECEDING PAGE]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties hereto as follows:

1, That the final paragraph of the judgment of this court herein, dated August 29, 1960, and filed in the office of the Clerk of this Court on August 29, 1960, be amended to read; "On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court; with costs to the appellants in the sum of $395.23".

2. That the bill of costs herein (#263, October Term, 1959) should be amended to reduce the costs of printing the appendix from $740.46 to the sum of $370.23 and the total sum shown in said bill of costs should be reduced from the sum of $765.46 to the sum of $395.23.

3. That the mandate of this court, previously issued herein, be amended to reflect the foregoing.

4. That the Clerk of this Court be, and he hereby is authorized to accomplish the foregoing without notice to either party, or that this court or any judge thereof be hereby authorized to sign an order directing the Clerk of this Court to accomplish the foregoing, without further notice to either party.

5. That all of the above is without prejudice to the right of any party to appeal or otherwise seek review of the judgment herein.

DATED: Sept. 26, 1960

BARTLE GORMAN (per JWA)
Attorney for Plaintiff-Appellee

.....
Attorney for Defendants-Appellants

Letter From Judge Brennan.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
CHAMBERS OF JUDGE STEPHEN W. BRENNAN
Utica 1, New York

September 28, 1960.

Bartle Gorman, Esq.
Attorney at Law
Insurance Building
Utica N. Y. Attention: J. Walter Augar, Esq.

Copal Mintz, Esq.
Attorney at Law
150 Broadway
New York 38, N. Y.

Re: Harshberger v. Associated
Transport—Civil No. 6539

Dear Sirs:

I am writing this letter to avoid any misunderstanding as to the status of the above matter.

On September 23 Mr. Augar appeared before me with the apparent purpose of objecting to the bill of costs in the above matter in accordance with notice of defendant's counsel. No proposed judgment had been received. A check of the Clerk's office so indicated.

On Saturday, September 24, the Clerk advised me that a proposed judgment had been received by him that morning from Mr. Mintz. Same was handed to me with the letter of September 20. I have been engaged in a trial term at Syracuse and the matter again comes to my attention.

I talked with Mr. Augar today and he advised there is some dispute as to the matter of costs which apparently must be settled in the Circuit Court. He advised the matter is being negotiated at the present time with Mr. Mintz and the difficulty may be ironed out.

Under the circumstances, I am holding the proposed judgment without action awaiting further information from counsel involved.

Very truly yours,

S. W. BRENNAN
Stephen W. Brennan
U. S. District Judge.

SWB/ec

Letter From Petitioner's Attorney

BARTLE GORMAN
ATTORNEY AND COUNSELOR AT LAW
110 Genesee Street
Utica, New York

J. WALTER AUGAR

EDWIN A. WASZKIEWICZ

September 28, 1960

Copal Mintz, Esq.
150 Broadway
New York, New York

RE: Harshberger vs Associated Transport, et ano
Associated Transport vs Harshberger

Dear Mr. Mintz:

Since I did not get to see Mr. Gorman until late today, I am writing this letter rather than telephoning you. Mr. Gorman states that he prefers to handle the matter as per the papers which we have sent to you. Frankly, I can not see where this will entail any measurable delay and I suggest that you proceed in this manner.

Very truly yours,

BARTLE GORMAN
By J. WALTER AUGAR

JWA/s

Letter From Respondents' Attorney to District Judge and Petitioner's Attorney

September 29, 1960

Hon. Stephen W. Brennan
United States District Court
Utica 1, New York

Re: Harshberger v. Associated Transport
Civil No. 6539

Dear Sir:

I thank your Honor for your letter of September 28th. I am sorry that there was a postal delay in the delivery of my papers which were mailed on September 20th.

Mr. Gorman, according to communications which I have received from his office, is of the view that the costs awarded by the Court of Appeals should have been in the sum of $395.23 rather than $765.46 and that in the action of Associated Transport, Inc. against Harshberger that court should have awarded costs in the sum of $27.87, and he has sent to me proposed stipulations and orders for entry in the Court of Appeals to effect those changes.

Rather than have any controversy as to the amount of costs, I have told Mr. Augur, in several telephone conversations I have had with him, that I am prepared to file in your court a waiver of $370.23 of the costs in the Harshberger action and, to that extent, an acknowledgment of satisfaction of the award of costs, leaving due $395.23, the amount which is satisfactory to Mr. Gorman, and as to the $27.87, I am prepared to send him a check, although if judgment were entered therefor, he would have only a right to offset them against the costs against Mrs. Harshberger rather than a right to be paid.

In those circumstances, I see no reason for any stipulations in and applications to the Court of Appeals. I can see no reason for Mr. Gorman's insistence on a court proceeding for that which I am willing to do voluntarily, without fuss and without controversy. Furthermore, Mr. Gorman raised no objection during the 15 day interval between the entry of the judgment in the Court of Appeals and its issuance of the mandate; nor would the entry of the judgment which I have proposed in any way prejudice whatever application Mr. Gorman may want to make to the Court of Appeals.

As far as I am concerned, Mr. Gorman does not and will not need to make any application, for my above stated offer to waive $370.23 of the awarded costs and to send him a check for $27.87 will continue to be available to him.

In the circumstances, I respectfully ask that the submitted judgment be signed and entered. I am prepared to stipulate, and hereby stipulate, that the above referred to offer, in regard to the costs, shall remain available to Mr. Gorman for a period of 30 days after the entry of judgment and will be complied with as soon as he indicates to me his acceptance thereof within that period.

Of course, I am sending a copy hereof to Mr. Gorman.

Very respectfully,

Copal Mintz

cm;bmh

cc Bartle Gorman, Esq.

Letter to Petitioner's Attorney

September 29, 1960

Bartle Gorman, Esq.
110 Genesee Street
Utica, New York

RE: Harshberger v. Associated Transport
Civil No. 6539

ATT: Mr. J. Walter Augar

Dear Mr. Augar:

For the life of me, I can see no reason for my going to court to get something for Mr. Gorman which I am willing to give him voluntarily.

In the circumstances and in view of Judge Brennan's letter of September 28th addressed to Mr. Gorman and myself, I am writing to the judge as per the enclosed copy.

Sincerely yours,

Copal Mintz

em:bmh

enc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 548

[illegible] M. HARSHBERGER, [illegible] Administrator of the Estate of HARRY NELSON HARSHBERGER, Deceased,

Petitioner,

v.

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SLENTON, *Respondents.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND R. DICKEY
1606 G Street, N. W.
Washington, D. C.
Attorney for Petitioner

On the Brief:

MARSHALL E. MILLER
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Washington 5, D. C.

[illegible] GORMAN
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[illegible] National Bank Bldg.
[illegible], Pennsylvania

[illegible] & DICKEY
[illegible] G Street, N. W.
[illegible]ington 5, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 548

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of HARRY NELSON HARSHBERGER, Deceased,
Petitioner,

v.

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SPENTON, *Respondents*.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In their brief at page 7, the respondents, relying upon some correspondence extraneous to the record herein, conclude with emphasis that the procedural question which petitioner seeks to raise here is improperly presented because the judgment of the District Court was rendered (1) in the exercise of its discretion, (2) with the full acquiescence of the petitioner.

The conclusion reached by respondents is improper since its bases are without merit. In this case, the trial

court denied respondents' (defendants') motions to dismiss plaintiff's case. The Court of Appeals reversed the judgment for the plaintiff, concluding that the trial court had erred in denying respondents' motions. The Court of Appeals stated that respondents' motions were equivalent to motions under Rule 50(b) of the Federal Rules of Civil Procedure, 28 U.S.C. following Section 723c. As a result of the decision of the Court of Appeals and its construction of the respondents' motions, the trial court should have exercised the discretion provided for by Rule 50(b) to either (1) enter judgment notwithstanding the verdict or (2) reopen the judgment and order a new trial. That the trial court in entering its order in this case, after the decision of the Court of Appeals, did not exercise its discretion is borne out by the affidavit of trial counsel which is reproduced below:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1960

DOROTHY M. HARSHBERGER, as Administratrix of the Estate of Harry Nelson Harshberger, Deceased, *Petitioner*,

v.

ASSOCIATED TRANSPORT, INC., and FLOYD KENNETH SPENCER, *Respondents*.

STATE OF NEW YORK
COUNTY OF ONEIDA
CITY OF UTICA } ss:

BARTLE GORMAN, being duly sworn, says that he was the attorney of record and actually tried the above entitled action for petitioner in the United States District Court for the Northern District of New York; that the appeal from the judgment rendered in said court in favor of the petitioner and against the respondent was argued in the Second Circuit Court of Appeals by J. Walter Augar, Esq., an associate of deponent, by reason of the fact that deponent was actually engaged in the trial of an action in the Supreme Court of the State of New York at the time said appeal was to be argued.

That deponent has had his attention called to respondent's brief and appendix in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and the plain inference sought to be drawn in said brief and appendix that the order of the Hon. Stephen W. Brennan, United States District Judge, signed by Judge Brennan on October 3, 1960, was signed as the result of the exercise by Judge Brennan of discretion upon his part as to whether or not the petitioner's complaint should be dismissed rather than a new trial granted. That under date of August 29, 1960, A. Daniel Fusaro, Esq., Clerk of the United States Circuit Court of Appeals for the Second Circuit, mailed deponent a form letter with the above caption in pen and ink, stating that the Court had on that day handed down a decision in the above entitled cause reversing in part; affirming in part the decision of the District Court and continuing that a copy of the opinion would be mailed to deponent tomorrow (August 30, 1960); that no further word was heard from the Clerk of the Court

so that a letter of inquiry was addressed to him under date of September 9, 1960, advising him of our receipt of the aforesaid form letter and of our failure to receive a copy of the Court's opinion and asked that one be sent along as soon as possible. Just prior to September 14, 1960, deponent was advised through Judge Brennan that a copy of the opinion of the United States Circuit Court of Appeals for the Second Circuit had been received by him and arrangements were made to borrow said opinion and photostat the same and a copy of the photostat was sent out on September 14, 1960, to Roger Williams, First National Bank Bldg., Utica, New York and to Maurice Shadden of Johnstown, New York, at their request. Deponent was informed by Judge Brennan at that time that the Circuit Court of Appeals had dismissed the above entitled action and that the matter was a closed incident because of the action of the Circuit Court of Appeals unless a certiorari was granted by the United States Supreme Court.

In the meantime the proposed judgment referred to by Mr. Mintz was discussed with me by Mr. Augar who had also received by Judge Brennan the Court's opinion that the action had been dismissed as a matter of law by the decision of the United States Circuit Court of Appeals. Mr. Augar carried on some correspondence with Mr. Mintz relative to what he thought was an error in the apportionment of the costs. Finally deponent was in the Chambers of Judge Brennan on another matter on or about October 3, 1960, at which time Judge Brennan brought up the subject matter of the proposed judgment that he had received from Mr. Mintz; that deponent advised Judge Brennan that he was not interested in the question of costs; that Mr. Augar had been corresponding with Mr. Mintz about and inquired what the purpose of the proposed judgment that Mr. Mintz desired signed was and that Judge Brennan advised deponent at that time that the proposed judgment of Mr. Minta was of no meaning whatsoever because the judgment of the Circuit Court of Appeals had been entered in the office of the Clerk of the United States District Court for the Northern District of New York and that the judgment of Mr. Mintz would be of no meaning whatsoever; that Mr. Mintz was apparently following the old practice that had formerly been engaged in where a formal judgment was entered and that it meant nothing. That thereupon deponent advised Judge Brennan that if the proposed judg-

ment of Mr. Mintz had no meaning whatsoever he would have no objection to it being entered. That deponent discussed the subject matter with Judge Brennan today and verified the substance of the discussion of October 3, 1960, that the execution of this judgment as prepared and presented by Mr. Mintz by Judge Brennan was done by him without the exercise of judicial discretion upon his part as to the granting or withholding of a new trial of the above entitled action as far as the petitioner herein was concerned; that in Judge Brennan's opinion the execution and filing of said judgment was superfluous and added nothing to the decision of the Circuit Court of Appeals for the Second Circuit.

BARTLE GORMAN

Subscribed and sworn to before me
this 27th day of December, 1960.

CATHERINE EVANS
Comm. of Deeds, Citynat Utica, New York

Although the Court of Appeals had been asked by the respondents (defendants) herein, upon reversing judgment for the plaintiff, to remand the case to the trial court so that the latter could for the first time exercise its discretion whether to grant a new trial or enter judgment n.o.v., the Court of Appeals refused to do so on the grounds that the District Court had passed on the motions. It misapprehended the basis for the respondents' request—namely that inasmuch as the District Court had overruled the respondents' motions, it had never had an opportunity to decide which alternative to follow if the motions were to be allowed. The District Court thereupon construed the action of the Court of Appeals as requiring it to enter judgment for the defendant, as appears from the foregoing.

Inasmuch as the trial court, in entering its order in this case, did not exercise its discretion, as evidenced by the foregoing, petitioner submits that the procedural

question raised by its petition is proper and that certiorari should be granted.

Respectfully submitted,

RAYMOND R. DICKEY
1406 G Street, N. W.
Washington, D. C.
Attorney for Petitioner

Of Counsel

MARSHALL E. MILLER
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